# Chapter 1

## New and continuing matters

1.1 This chapter provides assessments of the human rights compatibility of:

- bills introduced into the Parliament between 4 and 7 September (consideration of 5 bills from this period has been deferred);[1]
- legislative instruments received between 28 July and 10 August (consideration of 5 legislative instruments from this period has been deferred);[2] and
- bills and legislative instruments previously deferred.

1.2 The chapter also includes reports on matters previously raised, in relation to which the committee seeks further information following consideration of a response from the legislation proponent.

1.3 The committee has concluded its consideration of three instruments that were previously deferred.[3]

### Instruments not raising human rights concerns

1.4 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.[4] Instruments raising human rights concerns are identified in this chapter.

1.5 The committee has concluded that the remaining instruments do not raise human rights concerns, either because they do not engage human rights, they contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

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1 See Appendix 1 for a list of legislation in respect of which the committee has deferred its consideration. The committee generally takes an exceptions based approach to its substantive examination of legislation.

2 The committee examines legislative instruments received in the relevant period, as listed in the *Journals of the Senate*. See Parliament of Australia website, *Journals of the Senate*, http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

3 These are: Telecommunications (Integrated Public Number Database Scheme - Conditions for Authorisations) Determination 2017 [F2017L00941]; Telecommunications (Integrated Public Number Database Scheme - Criteria for Deciding Authorisation Applications) Instrument 2017 [F2017L00937]; and the Therapeutic Goods Legislation Amendment (2017 Measures No. 1) Regulations 2017 [F2017L00853].

4 See Parliament of Australia website, *Journals of the Senate*, http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

# Response required

1.6 The committee seeks a response or further information from the relevant minister or legislation proponent with respect to the following bills and instruments.

# Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017

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|---|---|
| **Purpose** | Seeks to amend the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the AML/CTF Act) and the *Financial Transaction Reports Act 1988* to: expand the objects of the AML/CTF Act to reflect the domestic objectives of AML/CTF regulation; regulate digital currency exchange providers; amend industry regulation requirements relating to due diligence obligations for correspondent banking relationships; deregulate the cash-in-transit sector, insurance intermediaries and general insurance providers; qualify the term 'in the course of carrying on in a business'; allow the sharing of information between related bodies corporate; increase the investigation and enforcement powers of the Australian Transaction Reports and Analysis Centre (AUSTRAC); provide police and customs officers broader powers to search and seize physical currency and bearer negotiable instruments; provide police and customs officers broader powers to establish civil penalties for failing to comply with questioning and search powers; revise the definitions of 'investigating officer', 'signatory' and 'stored value card' in the AML/CTF Act; and clarify other regulatory matters relating to the powers of the AUSTRAC CEO |
| **Portfolio** | Justice |
| **Introduced** | House of Representatives, 17 August 2017 |
| **Rights** | Criminal process rights; fair trial; right to be presumed innocent; not to be tried and punished twice; not to incriminate oneself (see **Appendix 2**) |
| **Status** | Seeking additional information |

## Civil penalty provisions

1.7 The Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017 (the bill) proposes to make four provisions in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the AML Act) into civil penalty provisions. Section 175 of the AML Act states that the maximum pecuniary penalty payable by an individual for a civil penalty provision is 20,000 penalty units (or $4.2 million).

1.8 Specifically, the proposed amendments would mean that an individual could be liable to a civil penalty of up to $4.2 million for a failure to notify the AUSTRAC CEO of a change in circumstances that could materially affect the person's registration;[5] a failure to declare an amount of currency or a bearer negotiable instrument when leaving or entering Australia;[6] or providing a registrable digital currency exchange service if not registered.[7]

***Compatibility of the measure with criminal process rights***

1.9 Civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (the burden of proof is on the balance of probabilities). However, if a civil penalty provision is in substance regarded as 'criminal' for the purposes of international human rights law, it will engage criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).

1.10 It is settled that a penalty or sanction may be 'criminal' for the purposes of the ICCPR, even where it is classified as 'civil' under Australian domestic law. The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to civil penalties. The classification of a penalty as 'criminal' under human rights law does not mean that the penalty is illegitimate, but rather that criminal process rights, such as the right to be presumed innocent and the right not to be tried and punished twice, apply.

1.11 The statement of compatibility does not identify that any rights are engaged by the civil penalty provisions and has not addressed whether they may be classified as 'criminal' for the purposes of international human rights law.

1.12 Applying the tests set out in the committee's *Guidance Note 2*, the first step in determining whether a penalty is 'criminal' is to look to its classification under domestic law. In this instance, the penalty is classified as 'civil' in the bill, however as stated above, this is not determinative of its status under international human rights law.

1.13 The second step is to consider the nature and purpose of the penalty. The penalty is likely to be considered to be criminal if the purpose of the penalty is to punish or deter, and the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context). In this instance, the purpose of the penalty is identified as to deter, however it appears to be restricted to the specific regulatory context of financial regulation.[8]

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5 See Schedule 1, item 20, proposed subsection 76P(3).

6 See Schedule 1, item 73, proposed subsection 199(13) and item 75, proposed subsection 200(16).

7 See Schedule 1, item 20, proposed subsection 76A(11).

8 Explanatory Memorandum (EM) 19.

1.14 The third step is to consider the severity of the penalty. It is here that potential concerns arise. A penalty is likely to be considered 'criminal' where it carries a penalty of a substantial pecuniary sanction. However, this must be assessed with due regard to regulatory context, including the nature of the industry or sector being regulated and the relative size of the pecuniary penalties being imposed. In this case, an individual could be exposed to a penalty of up to $4.2 million. These are very significant penalties and raise the concern that the provisions set out in [1.8] may be 'criminal' for the purposes of international human rights law.

1.15 As set out above, the consequence of this would be that the civil penalty provisions in the bill must be shown to be compatible with the criminal process guarantees set out in articles 14 and 15 of the ICCPR. However, in this case the measure does not appear to be consistent with criminal process guarantees. For example, the application of a civil rather than a criminal standard of proof raises concerns in relation to the right to be presumed innocent. The right to be presumed innocent generally requires that the prosecution prove each element of the offence to the criminal standard of proof of beyond reasonable doubt. Accordingly, were the civil penalty provisions to be considered 'criminal' for the purpose of international human rights law, there would be serious questions about whether they are compatible with criminal process rights.

## Committee comment

**1.16 The preceding analysis raises questions as to the compatibility of the civil penalty with criminal process rights.**

**1.17 The committee draws the attention of the minister to its *Guidance Note 2* and seeks the advice of the minister as to whether:**

- **the civil penalty provisions in the bill may be considered to be 'criminal' in nature for the purposes of international human rights law (having regard to the committee's *Guidance Note 2*); and**
- **if the penalties are considered 'criminal' for the purposes of international human rights law, whether the measures could be amended to accord with criminal process rights (including specific guarantees of the right to a fair trial in the determination of a criminal charge such as the presumption of innocence (article 14(2)), the right not to incriminate oneself (article 14(3)(g)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1))).**

# Further response required

1.18 The committee seeks a further response from the relevant minister or legislation proponent with respect to the following bills and instruments.

## Migration Amendment (Validation of Decisions) Bill 2017

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|---|---|
| **Purpose** | Seeks to ensure that visa cancellations or refusals based on information gained from gazetted law enforcement officers under section 503A of the *Migration Act 1958* remain valid at law |
| **Portfolio** | Immigration and Border Protection |
| **Introduced** | House of Representatives, 21 June 2017 |
| **Rights** | Prohibition on expulsion without due process; liberty; protection of the family; non-refoulement; freedom of movement; and effective remedy (see **Appendix 2**) |
| **Previous report** | 8 of 2017 |
| **Status** | Seeking further additional information |

### Background

1.19 The committee first reported on the Migration Amendment (Validation of Decisions) Bill 2017 (the bill) in its *Report 8 of 2017*, and requested a response from the Minister for Immigration and Border Protection by 28 August 2017.[1]

1.20 The bill passed in the House of Representatives on 16 August 2017 and in the Senate on 4 September 2017.

1.21 The minister's response to the committee's inquiries was received on 29 August 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

### Validation of decisions

1.22 Section 503A of the *Migration Act 1958* (the Migration Act) provides that information communicated to an authorised migration officer by a gazetted agency (such as law enforcement or intelligence agencies or a war crimes tribunal) for the purposes of making a decision to refuse or cancel a visa on character grounds, is protected from disclosure, not only to the person whose visa is refused or cancelled, but also to any court or tribunal reviewing that decision, and to parliament or a

1 Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) 32-43.

parliamentary committee. The minister has the non-compellable discretion to allow the disclosure after consulting the gazetted agency.

1.23 Section 503A(2) was found to be invalid by the High Court on 6 September 2017.[2] Section 503A(2) was found to be invalid to the extent that it prevented the minister from being required to divulge or communicate information to the High Court and the Federal Court when those courts engaged in judicial review of the minister's exercise of power to cancel or refuse to grant a visa. This was considered to amount 'in practice to shield the purported exercise of power from judicial scrutiny'[3] and to a 'substantial curtailment of the capacity of a court exercising jurisdiction… to discern and declare whether or not the legal limits of power conferred on the Minister by the Act have been observed'.[4] The High Court therefore considered that the minister made the decisions on the erroneous understanding as to what the exercise of the statutory power entailed, and quashed the decisions.

1.24 The bill seeks to ensure that, notwithstanding their reliance upon or regard to confidential information purportedly protected by section 503A, the minister or delegate's decisions regarding visa refusal or cancellation will remain valid.

***Compatibility of the measure with the prohibition on expulsion without due process***

1.25 The right not to be expelled from a country without due process is protected by article 13 of the International Covenant on Civil and Political Rights (ICCPR). It provides:

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

1.26 The article incorporates notions of due process also reflected in article 14 of the ICCPR,[5] which protects the right to a fair hearing.[6] As stated in the initial human

2 *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33.

3 *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33 at [53]

4 *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33 at [64].

5 See UN Human Rights Committee, *General Comment No. 32: The right to equality before courts and tribunals and to a fair trial*, (2007), [17], [62].

rights analysis, to the extent that domestic law gives authority to courts or tribunals to decide on expulsion or deportation decisions, the guarantees of fairness and equality of arms apply.[7] These demand that each side be given the opportunity to contest all the arguments and evidence adduced by the other party.[8] The Human Rights Committee has stated that the article requires that 'an alien […] be given full facilities for pursuing his remedy against expulsion so that this right will in all circumstances of his case be an effective one'.[9]

1.27 Under section 503A, both the person whose visa is refused or cancelled and any authority outside the department reviewing the decision are unable to require production of particular information on which the decision is based. The person is therefore prevented from effectively contesting or correcting potentially essential information and the reviewing authority is unable to scrutinise whether the decision was correct or reasonably made, thereby engaging and limiting the right of an alien to due process prior to expulsion.

1.28 The previous analysis noted that article 13 does contain an exception to the requirement to afford due process where 'compelling reasons of national security' exist. However, section 503A is broader than this exception. It does not require the minister to be satisfied that compelling national security reasons exist, but merely that the information relied upon is communicated to an authorised migration officer by a gazetted agency on the condition that it be treated as confidential. Indeed, there is no requirement to assess whether confidentiality is necessary against any standard. This raises serious questions as to whether section 503A is compatible with article 13.

1.29 In seeking to validate decisions which relied upon section 503A information, which has been found to be constitutionally invalid on the grounds and to the extent

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6 The UN Human Rights Committee has held that immigration and deportation proceedings are excluded from the ambit of article 14. See, for example, *Omo-Amenaghawon v. Denmark* (2288/2013), 23 July 2015, [6.4]; *Chadzjian et al. v. Netherlands* (1494/2006), 22 July 2008, [8.4]; and *K. v. Canada* (1234/2003), 20 March 2007, [7.4]-[7.5].

7 UN Human Rights Committee, *General Comment No. 32: The right to equality before courts and tribunals and to a fair trial* (2007) [62] ['the procedural guarantees of article 13 incorporate notions of due process also reflected in article 14 and thus should be interpreted in light of this latter provision. Insofar as domestic law entrusts a judicial body with the task of deciding about expulsions or deportations, the guarantee of equality of all persons before the courts and tribunals, as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable'].

8 UN Human Rights Committee, *General Comment No. 32: The right to equality before courts and tribunals and to a fair trial* (2007) [13], citing *Jansen-Gielen v. The Netherlands* (846/1999) Human Rights Committee, 3 April 2001 [8.2] and *Äärelä and Näkkäläjärvi v. Finland* (779/1997) Human Rights Committee, 24 October 2001 [7.4].

9 UN Human Rights Committee, *General Comment No. 15: The position of aliens under the covenant* (1986) [10].

set out in 1.23, the measure further limits the right to due process prior to expulsion under article 13.

1.30 The initial analysis stated that the right to due process prior to expulsion was not addressed in the statement of compatibility, and accordingly no assessment was provided as to whether the limitation was permissible. In the context of other rights, considered below, the statement of compatibility stated that the measure is a reasonable response to a legitimate objective. As discussed below at [1.55] to [1.56], there are serious questions as to whether the measure is effective to achieve, and proportionate to, the stated objectives.

1.31 The committee therefore requested the advice of the minister as to the compatibility of the measure with the right to due process prior to expulsion under article 13 of the ICCPR, particularly regarding the inability of affected individuals to contest or correct information on which the refusal or cancellation is based, and the absence of any standard against which the need for confidentiality of section 503A information is independently assessed or reviewed.

## Minister's response

1.32 The minister's response addresses each of the questions asked by the committee.

1.33 In relation to the compatibility of the measure with the right to due process prior to expulsion under article 13 of the ICCPR, the minister's response emphasises that the bill only applies to visa cancelation or refusal decisions that have already been made, and that the bill 'does not affect the ability to contest information or the assessment of the confidentiality of information, nor does it seek to limit review or due process prior to expulsion'. The minister's response further states:

> The High Court of Australia is considering the validity of section 503A in *Graham* and *Te Puia*. The construction of section 503A, including the ability of individuals to contest information on which a refusal or cancellation decision is based and the standard against which the need for confidentiality of information is independently assessed, is outside the scope of this Bill. Should the High Court determine that all or part of section 503A is invalid, the Department of Immigration and Border Protection (the Department) will consider the Court's findings in the context of future decision-making. In any event, persons who have had their visa cancelled, or visa application refused, on the basis of section 503A protected information will remain able to seek judicial review of their visa decision following the commencement of this amendment. This amendment does not prevent these individuals' access to judicial review should they decide to seek it. Nor does this amendment affect a person's right to seek merits review of a relevant decision to the extent that such review is provided for under existing law. The amendments seek only to validate the visa cancellation or visa application refusal decision, rather than the construction of section 503A or the ability for section 503A to protect certain sensitive information.

> The amendments will maintain the status quo for individuals who have already had their case thoroughly assessed and considered under migration legislation and affected individuals will continue to have review rights prior to expulsion. At the time of consideration, these persons failed the character test in accordance with Australian law and had no lawful right to hold a visa allowing them to enter or remain in Australia. They have had, and continue to have, access to judicial review of this decision and some of these individuals have challenged their cancellation or refusal decisions.

1.34 While the right to judicial review (and, in some circumstances, merits review) remains, the bill appears to preclude an affected individual from being able to challenge the lawfulness of the visa cancellation or refusal decision on the basis that the decision was made in reliance on information protected by section 503A. This issue seems to be acknowledged in the explanatory memorandum which notes that the bill does 'not affect a person's ability to seek judicial review of a decision described in paragraph 9 *on any other ground*, that is, on a ground *not mentioned* in paragraphs 10 and 11'.[10] Paragraphs 9, 10 and 11 of the explanatory memorandum summarise the content and operation of section 503E(1) and provide:

> New subsection 503E(1) applies to decisions made by the Minister under section 501, 501A, 501B, 501BA, 501C or 501CA before this item commences.
>
> Such a decision made by the Minister is not invalid, and is taken never to have been invalid merely because the Minister:
>
> - relied on; or
> - had regard to; or
> - failed to disclose in accordance with any applicable common law or statutory obligation;
>
> information that was protected, or purportedly protected, by subsection 503A(1) or (2) of the Act.
>
> Further, such a decision is not invalid, and is taken never to have been invalid merely because the Minister made the decision based on an erroneous understanding of section 503A or the protection that section would provide against an obligation to disclose information.

1.35 Furthermore, the effect of the measure is to prevent an affected individual from effectively contesting or correcting potentially essential information, and a Court or reviewing authority is unable to scrutinise whether the decision was correct or reasonably made. This limits the right to due process prior to expulsion under article 13 of the ICCPR, as set out in the initial analysis.

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10 Explanatory Memorandum 4 (emphasis added).

1.36 In relation to the committee's request for information regarding the absence of any standard against which the need for confidentiality of section 503A information is independently assessed or reviewed, the minister's response stated:

> The High Court's deliberations in the cases of *Graham* and *Te Puia* centre on whether the ability to protect information under section 503A is invalid in that it allows information to be withheld from judicial proceedings based on criteria that are not evaluative. The construction of section 503A and the nature of determining which information requires protection is outside the scope of this Bill.
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> Section 503A was introduced by the *Migration Legislation Amendment (Strengthening of Provisions Related to Character and Conduct) Act 1998* to facilitate law enforcement and intelligence agencies providing relevant information to the Department while ensuring that the content and sources will be protected. This includes protecting the information from disclosure to a court, tribunal, a parliament or parliamentary committee or any other body or person.
>
> In practice, law enforcement and intelligence agencies provide information to the Department, on the basis it can be protected from disclosure to any other person or body.
>
> The High Court is considering whether this protective power impairs the independence and impartiality of a court. Should the High Court determine that all or part of section 503A is invalid, the Department will consider the Court's findings in the context of future decision-making.

1.37 While, as the minister states, the construction of section 503A and the nature of determining which information requires protection is outside the scope of the bill, affected individuals whose visas have been cancelled or refused relying on information protected under section 503A will have their decisions retrospectively validated with no apparent assessment of whether confidentiality of matters that were kept from them pursuant to section 503A is necessary against any standard. The absence of any standard against which the need for confidentiality is independently assessed or reviewed further limits the right to due process prior to expulsion.

1.38 As the minister has not acknowledged this limitation, the minister has not undertaken an assessment of whether that limitation was permissible. In the context of other rights, considered below, the statement of compatibility stated that the measure is a reasonable response to a legitimate objective. As discussed below at [1.57] to [1.58], whilst the safety of the community and the integrity of the migration system are capable of constituting legitimate objectives under international human rights law, it cannot be concluded based on the evidence available that the measures are effective to achieve, and proportionate to, those objectives.

## Committee comment

**1.39 The committee thanks the minister for his response.**

**1.40 The preceding analysis raises serious concerns that the measure is likely to be incompatible with the right to due process prior to expulsion.**

**1.41 The committee seeks the minister's further advice as to the compatibility of the measure with the right to due process prior to expulsion in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33.**

***Compatibility of the measure with the right to liberty***

1.42 The right to liberty, contained in Article 9 of the ICCPR, prohibits the arbitrary and unlawful deprivation of liberty. This prohibition against arbitrary detention requires that the state should not deprive a person of their liberty except in accordance with law, but the concept of arbitrariness also extends beyond the apparent 'lawfulness' of detention to include elements of injustice, lack of predictability and lack of due process.[11] The right to liberty applies to all forms of deprivations of liberty, including immigration detention, although what is considered as arbitrary may vary depending on context.

1.43 Under the Migration Act, the cancellation of the visa of a non-citizen living in Australia results in that person being classified as an unlawful non-citizen, and subject to mandatory immigration detention prior to removal or deportation.[12] The previous analysis stated that by validating decisions to cancel a visa which may otherwise be invalid, the measure engages and limits the right to liberty.

1.44 However, the statement of compatibility argues that the bill does not limit the right to liberty as it:

> introduces a legislative amendment that preserves the grounds upon which certain non-citizen's visas were cancelled, or their applications refused, the result of which may be subsequent detention, supporting existing laws that are well-established, generally applicable and predictable.[13]

1.45 The initial analysis noted that the concept of 'non-arbitrariness' under international law is not limited to general applicability and predictability, although it includes both those concepts. The detention of a non-citizen on cancellation of their visa will generally not constitute arbitrary detention, as it is permissible to detain a person for a reasonable time pending their deportation. Detention may however become arbitrary in the context of mandatory detention, where individual circumstances are not taken into account, and a person may be subject to a

11 See, for example, Human Rights Committee, *General Comment 35: Liberty and security of person* (2014) [11]-[12].

12 See *Migration Act 1958*, sections 189, 198.

13 Statement of compatibility (SOC) 6.

significant length of detention without knowing or being able to contest the information on which their detention is based before an independent body.[14]

1.46 In relation to section 503A, arbitrariness may arise because a person is prevented from accessing and addressing evidence upon which the visa cancellation, and therefore detention pending removal, is based. In seeking to broadly validate decisions which had regard to section 503A information, the bill would perpetuate the existing serious concerns in relation to section 503A.

1.47 In relation to the risk of indefinite detention, the statement of compatibility states that '[t]he determining factor [in whether detention is arbitrary] is not the length of detention, but whether the grounds for the detention are justifiable'.[15] However, as stated by the United Nations Human Rights Committee (UNHRC) '[t]he inability of a state to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention'.[16] The risk of arbitrariness in this situation is exacerbated where a person is deprived of legal safeguards to effectively challenge the basis of their detention, such as access to information relied upon in refusing or cancelling a visa.[17]

1.48 A measure may permissibly limit the right to liberty where it supports a legitimate objective, is rationally connected to that objective, and is a proportionate way to achieve that objective.

1.49 The statement of compatibility identifies the objectives of the measure as being:

> …[to ensure] the safety of the Australian community and integrity of the migration programme — as it seeks to uphold certain character refusal or cancellation decisions in the event of a High Court ruling on the validity of section 503A. These non-citizens pose an unacceptable risk to the Australian community if their cancellation decisions are overturned and

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14 See *F.K.A.G v. Australia* (2094/2011) Human Rights Committee, 20 August 2013 [9.5]; *M.M.M et al v Australia* (2136/2012) Human Rights Committee, 25 July 2013 [10.4] ['the authors are kept in detention in circumstances where they are not informed of the specific risk attributed to each of them… They are also deprived of legal safeguards allowing them to challenge their indefinite detention'].

15 SOC 6.

16 Human Rights Committee, *General Comment 35: Liberty and security of person* (2014), [18].

17 *F.K.A.G v. Australia* (2094/2011) Human Rights Committee, 20 August 2013 [9.5] [The authors of the communication were detained in Australia as they were refused visas to stay following adverse security assessments from ASIO, but were unable to be returned to their country of origin due to their refugee status. The Committee held in relation to five of the authors: 'Given the vague and too general justification provided by the State party as to reasons for not providing the authors with specific information about the basis for the negative security assessments, the Committee concludes that, for these five authors, there has been a violation of article 9, paragraph 2 of the Covenant'].

> they are required to be released from immigration detention into the community.[18]

1.50 The statement of compatibility indicates that the measures are reasonable as:

> This Bill will not prevent the affected non-citizens from individually challenging their decisions in a court. The detention of a non-citizen under these circumstances is considered neither unlawful nor arbitrary under international law.[19]

1.51 However, as the previous analysis noted, it is unclear upon what basis an affected non-citizen would be able to challenge their visa cancellation or refusal in a court. Indeed, the intent of the measure appears to be to preclude affected persons from successfully challenging visa cancellations or refusals made in reliance on information that was not disclosed pursuant to section 503A, notwithstanding the invalidity of section 503A(2).

1.52 With particular reference to the risk that a person may be arbitrarily detained, the statement of compatibility states:

> The Government has processes in place to mitigate any risk of a non-citizen's detention becoming indefinite or arbitrary through: internal administrative review processes; Commonwealth Ombudsman enquiry processes, reporting and Parliamentary tabling; and, ultimately the use of the Minister's personal intervention powers to grant a visa or residence determination where it is considered in the public interest.[20]

1.53 As considered in a previous human rights assessment of visa cancellation powers,[21] ensuring the safety of Australians and the integrity of the immigration system are capable of constituting legitimate objectives for the purposes of international human rights law.

1.54 However, the measure seeks to validate administrative decisions made with regard to information which was not disclosed to the affected person, and could not be effectively tested in a court for reliability, relevance or accuracy. The effectiveness of the measure to ensure the safety of Australians and the integrity of the immigration system is therefore questionable.

1.55 Moreover, in order for a measure to be a proportionate limitation on a right, it must be the least rights restrictive means of achieving the legitimate objective of the measure. The previous analysis stated that it is difficult to see how validating

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18 SOC 6.

19 SOC 6.

20 SOC 6.

21 Parliamentary Joint Committee on Human Rights, *Nineteenth report of the 44th Parliament* (3 March 2015) 18.

decisions to cancel visas based on information that is kept from the person affected, broadly as a class, is the least rights restrictive means of achieving the stated objectives. It would appear to be possible for the minister to make a renewed decision to refuse or cancel the visa of an affected person on an individual basis. Insofar as information is sought to be kept from the affected person for reasons of national security, the statement of compatibility does not address alternative means that may be available that would protect such information only to the extent required for national security or alternative processes that would still allow such information to be tested in some way before a court or tribunal. More broadly, it is not clear from the statement of compatibility why existing criminal justice or national security mechanisms are insufficient to counter any risk a person may pose should the cancellation of their visa be invalid as a consequence of the High Court's decision.

1.56 No detail was provided regarding the functioning or effectiveness of internal review processes, or the oversight processes referred to in the statement of compatibility. While the administrative and discretionary processes identified may in some circumstances mitigate the risk of arbitrary or indefinite detention, they are unlikely to constitute sufficient safeguards under international law, due to their discretionary nature.[22]

1.57 The committee therefore requested the advice of the Minister for Immigration and Border Protection as to the compatibility of the measure in relation to the right to liberty, particularly regarding:

- why the broad legislative validation of a class of decisions is required, when it appears that the minister could make a renewed decision to refuse or cancel the visa of an affected person on an individual basis;
- any alternative means that may be available that would protect such information only to the extent required for national security or alternative processes that would still allow such information to be tested in some way before a court or tribunal; and
- the availability of less rights restrictive criminal justice or national security mechanisms to address any risk posed by affected individuals.

## Minister's response

1.58 In relation to the compatibility of the measure with the right to liberty, the minister's response stated:

> **Broad legislative validation**
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> These measures ensure that non-citizens affected will not have their visas reinstated as a result of the High Court decision in the cases of *Graham* or

22 For example, the Commonwealth Ombudsman cannot override the decisions of agencies it deals with, but tries to resolve disputes through consultation and negotiation.

*Te Puia*. Reinstatement of such visas could result in either release from immigration detention or the ability to return to Australia. These non-citizens have had their cases thoroughly assessed and considered under migration legislation. At the time of this consideration, these persons failed the character test due to them being of serious character concern, and range from being members of outlawed motorcycle gangs to those with serious criminal records. The safety of the Australian community has been integral to these considerations. As a result of the cancellation or refusal decision, they have no lawful right to hold a visa allowing them to enter or remain in Australia.

In the event that the High Court finds that all or part of section 503A is invalid, the resultant release of affected individuals from immigration detention, or their ability to enter Australia, while their cases are being reconsidered puts the Australian community at an unacceptable risk and would understandably undermine public confidence in the integrity of Australia's migration framework. The broad application of this Bill is appropriate given the high risk to the Australian community if these measures are not taken and is effective and proportionate to the legitimate objective of protecting the Australian community.

**Alternative means to protect information**

The need for an alternative means to protect information may be considered should the High Court find all or part of section 503A invalid. However, possible amendments to s503A are outside the scope of this Bill.

**Alternative mechanisms to address risks posed by affected individuals**

The availability of less rights restrictive criminal justice or national security mechanisms to address the risk posed by affected individuals is outside the scope of this Bill. Individuals affected by the measures in this Bill have been assessed as being a risk to the Australian community and do not meet the migration programme's character requirements. As such, these individuals have no lawful right to hold a visa allowing them to enter or remain in Australia, and if they are in Australia this means they must be detained under the Migration Act. The use of protected information under section 503A in cancellation decisions does not alter the risk to the community posed by persons who have failed the character test.

If this measure is not passed by the parliament, there is a risk that following the High Court's decision those affected individuals will have visas reinstated or granted, which means those who are onshore may be released back into the Australian community, and those who are offshore will be able to return to Australia. The Australian Government cannot detain persons who have a valid visa, and therefore there are no currently available alternative mechanisms to address the risks posed by the affected individuals.

1.59 As noted in the previous human rights analysis, ensuring the safety of Australians and the integrity of the immigration system are capable of constituting

legitimate objectives for the purposes of international human rights law. However, the minister's statement that these individuals have 'failed the character test' and thereby pose a risk to the Australian community such as to warrant their detention must be understood in the context that the legislation at the time allowed these administrative decisions to be made without the person knowing, or a court being able to test, information disclosed pursuant to section 503A for reliability, relevance or accuracy. The minister's response therefore does not address the serious concerns identified in the initial analysis as to the effectiveness of the measure to ensure the safety of Australians and the integrity of the immigration system.

1.60 As the minister considered that the committee's questions as to whether there are any alternative means available to protect the information, or whether any less restrictive measures are available to address the risks posed by the affected individuals, were outside the scope of the bill, the minister's response does not substantively address these concerns. However, as the effect of the bill is to retrospectively validate the minister's decisions based on information provided pursuant to section 503A, the bill in effect upholds the process facilitated by section 503A, notwithstanding the constitutional invalidity of section 503A(2). The concerns raised in the previous human rights analysis as to whether there are alternative and less restrictive means available to protect information and to protect the community against risk, which arise as a consequence of validating the minister's reliance on section 503A, therefore remain. Even if it were to be accepted that detention is an appropriate response to the risk posed by particular individuals, it is not possible to conclude that validating decisions that result in mandatory detention, of a class of persons rather than on an individual basis, on information that is kept from each person, is the least restrictive means of achieving the stated objectives.

1.61 Based on the information provided and the previous human rights analysis, the measure may give rise to arbitrariness and there are serious concerns that the measure is likely to be incompatible with the right to liberty.

## Committee comment

**1.62 The committee thanks the minister for his response.**

**1.63 The preceding analysis raises serious concerns that the measure is likely to be incompatible with the right to liberty.**

**1.64 The committee seeks the minister's further advice as to the compatibility of the measure with the right to liberty in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33**

***Compatibility of the measure with the right to protection of the family***

1.65 The right to protection of the family includes ensuring that family members are not involuntarily and unreasonably separated from one another. This right may be engaged where a person is expelled from a country without due process and is

thereby separated from their family life.[23] The initial human rights analysis stated that the measure engages and limits the right to protection of the family as the validation of a visa cancellation could operate to separate family members.

1.66 The statement of compatibility reasons that the amendments cannot be said to give rise to arbitrary interference with family life as they do not 'expand visa cancellation powers or impact the grounds upon which a person may have had their visa cancelled'.[24]

1.67 However, the bill seeks to validate decisions to cancel or refuse a visa which had regard to information protected under section 503A, that may now be affected by the invalidity of section 503A(2). In each such individual case, the measure has potential for arbitrary interference with family life, due to a lack of due process provided to the affected person.

1.68 As noted in the previous analysis, of relevance in this respect is the case of *Leghaei v Australia*, in which the author of the communication to the UNHRC was denied a permanent visa to remain in Australia on the basis that the author had been assessed by the Australian Security Intelligence Organisation (ASIO) as being a threat to national security. His wife and four children were either Australian citizens or permanent residents. The UNHRC found a violation of article 17 of the ICCPR read in conjunction with article 23:

> While his legal representatives were provided with information on evidence held against him, they were prevented, by a decision by the judge, from communicating to the author any information that would permit him to instruct them in return and to refute the threat that he allegedly posed to national security.
>
> In light of the author's 16 years of lawful residence and long-settled family life in Australia and absence of any explanation from the State party as to the reasons for terminating his right to remain, except for the general assertion that it was done for 'compelling reasons of national security', the Committee finds that the State party's procedure lacked due process of law… the Committee considers that the State Party has violated the author's rights under article 17, read in conjunction with article 23…[25]

1.69 Section 503A goes further than the provision at issue in *Leghaei v Australia* in withholding the information from not only the person, but also their lawyer and the court. There is therefore a serious risk that decisions based on information protected by section 503A limit the right to freedom from arbitrary interference in family life. The statement of compatibility did not address the matters raised in *Leghaei v Australia*.

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23 *Leghaei v Australia* (1937/2010) Human Rights Committee, 26 March 2015.

24 SOC 7.

25 *Leghaei v Australia* (1937/2010) Human Rights Committee, 26 March 2015 [10.4]-[10.5].

1.70 The committee therefore requested the advice of the minister as to:

- any safeguards in relation to the particular circumstances of families; and
- the concerns outlined in *Leghaei v Australia*, including the inability of affected individuals to contest or correct information on which the refusal or cancellation is based.

## Minister's response

1.71 In relation to the compatibility of the measure with the right to protection of the family, the minister's response states:

> Australia acknowledges its obligations under the ICCPR not to subject individuals to arbitrary or unlawful interference with the family, and accordingly the Department takes all matters concerning interference with families seriously. It is important to note that all visa cancellation and visa application refusal decisions affected by this Bill were made prior to the Bill's commencement.
>
> The rights relating to protection from arbitrary interference with family are taken into account as part of any request for visa revocation where the visa is mandatorily cancelled without notice, or where a decision to cancel or refuse a visa on character grounds is made. In both circumstances the impact on family members affected by the decision is a consideration, which will be weighed against factors such as the risk the person presents to the Australian community.
>
> This Bill introduces no new decision-making capability or power, seeking only to uphold decisions already made. The considerations relating to family remain unchanged in the cancellation of visas or refusal of visa application on character grounds.
>
> **The concerns outlined in *Leghaei* v *Australia***
>
> The Australian Government respectfully disagreed with the views of the Human Rights Committee in *Leghaei* v *Australia*, that Australia's procedures lacked due process of law and that Dr Leghaei's rights were violated under article 17, read in conjunction with article 23, of the ICCPR. The Australian Government did not accept that there was a lack of due process leading up to Dr Leghaei's removal and considers that interference with the family was not arbitrary, given that his removal was on the basis that he was lawfully assessed as being a direct risk to Australia's national security.
>
> The concerns of the Parliamentary Joint Committee on Human Rights highlighted at 1.199 of the Report, relate to the ability of affected individuals to contest information on which refusal or cancellation is based. As discussed above, this concerns the construction of section 503A, which is currently being considered by the High Court. The amendment does not change considerations relating to interference with family in the cancellation or refusal of visas on character grounds. As such, the inquiry

into due process and the resulting impact on article 17 is outside the scope of this Bill.

1.72 The effect of the bill is to validate decisions made based on information provided pursuant to section 503A. In this respect, the construction and effect of section 503A is directly relevant to the individuals affected by the measure. An effect of the bill is that those individuals may be precluded from successfully challenging visa cancellations or refusals made in reliance on information that was not disclosed pursuant to that section, notwithstanding that section 503A(2) is invalid.

1.73 The minister's response does not identify any safeguards beyond the indication that a person's family circumstances are a consideration when deciding whether or not to cancel or refuse a visa. However, at the time the visa cancellation or refusal decisions were made, the consideration of any other factors would potentially have been informed by information protected by section 503A. In light of the concerns earlier expressed as to the lack of due process provided to the affected person through the operation of section 503A, the minister's response does not adequately address the serious concerns raised in the initial analysis as to the adequacy of any safeguards to protect against the arbitrary interference with family life.

1.74 As to the minister's response to the committee's question concerning *Leghaei v Australia,* the UNHRC's views are not binding on Australia as a matter of international law. Nevertheless, as the UN body responsible for interpreting the ICCPR, the UNHRC's views are highly authoritative interpretations of binding obligations under the ICCPR and should be given considerable weight by the government in its interpretation of Australia's obligations. Moreover, these statements of the UNHRC are persuasive as interpretations of international human rights law that are consistent with the proper interpretation of treaties as set out in the Vienna Convention on the Law of Treaties.[26] In this respect, as a principle of international law, it is not open for a state party to a treaty to unilaterally interpret its treaty obligations.[27]

## Committee comment

**1.75 The committee thanks the minister for his response.**

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26 Australia is a party to this treaty and has voluntarily accepted obligations under it. Article 31 of the treaty provides that treaties are to be interpreted in good faith, according to ordinary meaning, in context, in light of object and purpose. Subsequent practice in the application and interpretation of the treaties is to be taken together with context in the interpretation of treaty provisions. The views of human rights treaty monitoring bodies may be considered an important form of subsequent practice for the interpretation of Australia's treaty obligations. More generally, statements by human rights treaty monitoring bodies are generally seen as authoritative and persuasive for the interpretation of international human rights law.

27 Articles 26, 27 31(1) of the Vienna Convention on the Law of Treaties.

**1.76 The preceding analysis and the previous human rights analysis raise serious concerns that the measure is likely to be incompatible with the right to family life.**

**1.77 The committee seeks the minister's further advice as to the compatibility of the measure with the right to family life in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33.**

***Compatibility of the measure with the right to non-refoulement in conjunction with the right to an effective remedy***

1.78 Australia has non-refoulement obligations under the Refugee Convention, the ICCPR and the Convention Against Torture (CAT). This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[28] Non-refoulement obligations are absolute and may not be subject to any limitations.

1.79 As the committee has previously stated on numerous occasions, effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to giving effect to non-refoulement obligations.[29]

1.80 The statement of compatibility acknowledges that the bill may 'engage [the right to non-refoulement] because one eventual consequence of confirming the validity of decisions to refuse or cancel a visa may be removal from Australia'. However, it goes on to state that the amendments do not set out that the automatic consequence of validating the decision will be removal from Australia and that consideration of non-refoulement obligations is undertaken 'before a non-citizen is considered to be available for removal from Australia. Any removal from Australia is conducted in accordance with Australia's non-refoulement obligations'.[30]

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28 See Refugee Convention, article 33. The non-refoulement obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the ICCPR are known as 'complementary protection' as they are protection obligations available both to refugees and to people who are not covered by the Refugee Convention, and so are 'complementary' to the Refugee Convention.

29 ICCPR, article 2; *Alzery v Sweden* (1416/2005), UN Human Rights Committee, 25 October 2006. See, for example, Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 45; and *Fourth Report of the 44th Parliament* (18 March 2014) 51; *Report 2 of 2017* (21 March 2017) 10.

30 SOC 7-8.

1.81 Under section 501E of the Migration Act, a person whose visa is refused or cancelled on character grounds is prohibited from applying for another visa.[31] Section 198 of the Migration Act requires an immigration officer to remove an unlawful non-citizen in a number of circumstances as soon as reasonably practicable. Section 197C of the Migration Act also provides that, for the purposes of exercising removal powers under section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen. There is no statutory protection ensuring that an unlawful non-citizen to whom Australia owes protection obligations will not be removed from Australia, nor is there any statutory provision granting access to effective and impartial review of the decision as to whether removal is consistent with Australia's non-refoulement obligations. As stated in previous human rights assessments, ministerial discretion not to remove a person is not a sufficient safeguard under international law.[32] Therefore concerns remain that the measure may engage and limit the right to non-refoulement in conjunction with the right to an effective remedy.

1.82 The committee notes that the obligation of non-refoulement is absolute and may not be subject to any limitations.

1.83 The committee notes that the measure does not provide a non-discretionary bar to refoulement, nor merits review of decisions relating to the validation of visa cancellation or refusal decisions, and is therefore likely to be incompatible with Australia's obligations under the ICCPR and the Convention Against Torture.

## Minister's response

1.84 In relation to these concerns, the minister's response states:

> The Department recognises that non-refoulement obligations are absolute and does not seek to resile from or limit Australia's obligations. *Non-refoulement* obligations are considered as part of a decision to cancel or refuse a visa under character grounds. Anyone who is found to engage Australia's non-refoulement obligations will not be removed in breach of those obligations. As noted above, this amendment upholds the validity of visa cancellation or visa application refusal decisions made with regard to information protected by section 503A. It does not affect the consideration of visa cancellations or visa refusals under character grounds

31 A person may apply for a protection visa or, if formally invited by the minister to do so, a Bridging R (Class WR) Visa. However, if the visa that was cancelled was a protection visa, the person will be prevented from applying for another protection visa unless the minister exercises a personable, non-compellable power to do so. The Bridging R (Class WR) Visa is temporary and applies so long as the minister is satisfied that the person's removal is not reasonably practicable.

32 See for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 77-78.

> generally, and *non-refoulement* obligations will continue to be considered as part of this process.
>
> There are mechanisms within the Migration Act which provide the Government with the ability to address *non-refoulement* obligations before consideration of removal. For example, Australia's *non-refoulement* obligations are met through the protection visa application process or the use of the Minister's personal powers in the Migration Act. The form of administrative arrangements in place to support Australia meeting its *non-refoulement* obligations is a matter for the Government. This consideration is separate from the duty established by the removal power. The revalidation of decisions that used information protected by section 503A will not affect Australia continuing to uphold its *non-refoulement* obligations.
>
> As previously stated, this Bill introduces no new decision-making capability or power, seeking only to uphold decisions already made. The considerations relating to *non-refoulement* remains unchanged in the cancellation of visas or refusal of visa application on character grounds.

1.85 While the bill introduces no new decision-making capability or power, the effect of upholding decisions already made is that the concerns relating to non-refoulement that arise from the operation of section 503A are upheld and perpetuated. As stated in previous human rights assessments, ministerial discretion not to remove a person is not a sufficient safeguard under international law.[33]

## Committee comment

**1.86 The committee thanks the minister for his response.**

**1.87 The preceding analysis and the previous human rights analysis raise serious concerns that the measure is likely to be incompatible with the obligation of non-refoulement in conjunction with the right to an effective remedy.**

**1.88 The committee seeks the minister's further advice as to the compatibility of the measure with the obligation of non-refoulement in conjunction with the right to an effective remedy in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33.**

33 See for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 77-78.

***Compatibility of the measure with freedom of movement (right to enter one's own country)***

1.89 The right to freedom of movement is protected under article 12 of the ICCPR and includes a right to leave Australia as well as the right to enter, remain, or return to one's 'own country'.[34]

1.90 The reference to a person's 'own country' is not restricted to the formal status of citizenship. It includes a country to which a person has very strong ties, such as the country in which they had resided for a substantial period of time and established their home.[35]

1.91 The previous analysis stated that the right to freedom of movement is engaged by this measure, as an eventual consequence of validating visa cancellation decisions is the deportation and re-entry ban of a person who may, despite not holding formal citizenship, have such strong ties to Australia that they consider Australia to be their 'own country'.

1.92 The statement of compatibility does not acknowledge that the right to enter one's own country is engaged and limited, however in the context of other rights, states that the measure is a reasonable response to a legitimate objective. As discussed above at [1.55] to [1.56], whilst the safety of the community and the integrity of the migration system are capable of constituting legitimate objectives under international human rights law, there are serious questions as to whether the measure is effective to achieve, and proportionate to, those objectives.

1.93 The preceding analysis raises questions as to the compatibility of the measure with the right to freedom of movement (the right to enter one's own country).

1.94 The committee therefore sought further information from the minister as to the proportionality of the measure, in particular regarding any safeguards applicable to individuals for whom Australia is their 'own country', such as ensuring their visa is only cancelled as a last resort where other mechanisms to protect the safety of the Australian community are unavailable.

## Minister's response

1.95 In relation to the compatibility of the measure with the right to freedom of movement and the existence of applicable safeguards, the minister's response states:

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34 Article 12 of the ICCPR.

35 See, for example, *Nystrom v Australia* (2011), UN Human Rights Committee, CCPR/C/102/D/1557/2007 [explaining that a person may have stronger ties with a country of which they are not a national, than a country of which they hold citizenship]; Parliamentary Joint Committee on Human Rights, *Thirty-fourth report of the 44th parliament* (23 February 2016) 46-50.

> It is important to note that all visa cancellation and visa application refusal decisions affected by this Bill were made prior to the Bill's commencement.
>
> An individual's ties to Australia are taken into account as part of any request for visa revocation where the visa is mandatorily cancelled without notice, or where a decision to cancel or refuse a visa on character grounds is made. In both circumstances the individual's ties to Australia are not a primary consideration, whereas factors such as the risk the person presents to the Australian community does constitute a primary consideration. Delegates making a decision on character grounds are bound by a relevant Ministerial Direction, which requires a balancing of these countervailing considerations. While an individual's ties to Australia can be considered, there will be circumstances where this will be outweighed by the risk to the Australian community due to the seriousness of the person's criminal record or past behaviour or associations.
>
> Decisions by the Minister to refuse to grant or to cancel a visa under subsection 501(3) of the Act (the power to cancel without notice) are not subject to the rules of natural justice. However, under these parts of the Act, the Minister may only refuse to grant or cancel a visa where he or she is satisfied that it is in the national interest to do so. In circumstances where natural justice does not apply, any information about a person's personal circumstances that is before the Minister at the time of consideration must be taken into account in the making of the decision.
>
> This Bill introduces no new decision-making capability or power, seeking only to uphold decisions already made, which have already considered ties to Australia as detailed above. As set out above, decisions to cancel or refuse a visa on character grounds takes into account a person's ties to the Australian community and weighs them against other relevant considerations.

1.96 While the bill introduces no new decision-making capability or power, the effect of upholding decisions already made is that the concerns relating to freedom of movement that arise from the operation of section 503A are upheld and perpetuated. An eventual consequence of validating visa cancellation or refusal decisions is the deportation and re-entry ban of a person who may, despite not holding formal citizenship, have such strong ties to Australia that they consider Australia to be their 'own country'. As such, the bill engages and limits freedom of movement. While the minister's response outlines the existing processes for taking into account a person's ties to the Australian community when deciding whether to cancel or refuse a visa on character grounds, to the extent that those processes may have been informed by information provided pursuant to section 503A, the minister's response does not adequately address the concerns raised in the previous human rights analysis as to whether the measure is compatible with the right of a person to remain in their 'own country'. In this respect, it is further noted that the

committee has previously concluded that visa cancellation powers may be incompatible with the right to return to and remain in one's own country in relation to Australian permanent residents with longstanding or otherwise strong ties to Australia.[36]

## Committee comment

**1.97 The committee thanks the minister for his response.**

**1.98 The preceding analysis raises serious concerns that the measure is likely to be incompatible with the right to freedom of movement.**

**1.99 The committee seeks the minister's further advice as to the compatibility of the measure with the right to freedom of movement in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33.**

### *Compatibility of the measure with the right to an effective remedy*

1.100 Should section 503A impermissibly limit a human right, those affected have the right to an effective remedy. The right to an effective remedy is protected by article 2 of the ICCPR, and may include restitution, guarantees of non-repetition of the original violation, or satisfaction. The right to an effective remedy may take many forms, however it is not able to be limited according to the usual proportionality framework.

1.101 As stated in the initial analysis, in relation to the human rights implications of section 503A, the right to an effective remedy would likely include a fresh review of the expulsion decision, where the person affected is entitled to access and challenge adverse evidence, including section 503A protected information.

1.102 It is unclear whether the bill would allow affected persons to challenge the decision anew and access the information previously protected by section 503A in those proceedings in light of the invalidity of section 503A(2).

1.103 The statement of compatibility does not acknowledge that the right to an effective remedy was engaged by the measure.

1.104 The committee therefore sought the advice of the minister as to whether in the event that section 503A is held to be invalid, a person whose decision is validated under the amendments will be able to challenge the refusal or cancellation decision anew and access information previously protected under section 503A, in those proceedings.

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36 See Parliamentary Joint Committee on Human Rights, *Thirty-Fourth Report of the 44th Parliament* (23 February 2016) 50; *Thirty-Six Report of the 44th Parliament* (16 March 2016) 195-217.

## Minister's response

1.105 In relation to the compatibility of the measure with the right to an effective remedy, the minister's response states:

> The ability to challenge visa cancellation or visa application review decisions anew and access information previously protected under section 503A is outside the scope of this Bill. While affected individuals have had, and will continue to have, review rights for their visa cancellation or application refusal decisions, how this might change following the decision of the High Court will be dependent on the Court's findings.

1.106 As stated at [1.34], the explanatory memorandum notes the bill does not affect a person's ability to seek judicial review of a decision on a ground '*not mentioned*' in section 503E(1).[37] The bill therefore appears to potentially preclude an affected individual from being able to challenge the lawfulness of the visa cancellation or refusal decision on the basis that the decision was made in reliance on information protected by section 503A. It is therefore not clear the basis upon which the minister considers that the ability to challenge visa cancellation or visa application review decisions anew and access information previously protected under section 503A is outside the scope of the bill. It is noted that there has been no explanation of how this review might operate and the scope of the review.

## Committee comment

**1.107 The committee thanks the minister for his response.**

**1.108 The preceding analysis raises serious concerns that the measure is incompatible with the right to an effective remedy.**

**1.109 The committee seeks the minister's further advice as to the compatibility of the measure with the right to an effective remedy in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33.**

37 EM 4 (emphasis added).

# Advice only

1.110 The committee draws the following bills and instruments to the attention of the relevant minister or legislation proponent on an advice only basis. The committee does not require a response to these comments.

## Autonomous Sanctions Amendment (Democratic People's Republic of Korea) Regulations 2017 [F2017L00880]

## Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 [F2017L00637]

## Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment List 2017 [F2017L00675]

## Charter of the United Nations (Sanctions—Democratic People's Republic of Korea) Amendment (2017 Measures No. 1) Regulations 2017 [F2017L00878]

| | |
|---|---|
| **Purpose** | To amend the Autonomous Sanctions Regulations 2011 by imposing additional sanctions in respect of the Democratic People's Republic of Korea; and apply the operation of the sanctions regime under the Autonomous Sanctions Regulations 2011 and the *Charter of the United Nations Act 1945* by designating or declaring that a person is subject to the sanctions regime and by giving effect to decisions of the United Nations Security Council |
| **Portfolio** | Foreign Affairs |
| **Authorising legislation** | *Autonomous Sanctions Act 2011* and *Charter of the United Nations Act 1945* |
| **Last day to disallow** | 15 sitting days after tabling ([F2017L00880] and [F2017L00878] tabled 8 August 2017; [F2017L00637] tabled 13 June 2017; [F2017L00675] tabled House of Representatives 19 June 2017 and Senate 20 June 2017) |
| **Rights** | Privacy; fair hearing; protection of the family; equality and non-discrimination; adequate standard of living; freedom of movement; non-refoulement (see **Appendix 2**) |
| **Status** | Advice only |

## Background

1.111 The Autonomous Sanctions Amendment (Democratic People's Republic of Korea) Regulations 2017 [F2017L00880], Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 [F2017L00637] and Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment List 2017 [F2017L00675] are made under the *Autonomous Sanctions Act 2011*. This Act (in conjunction with the Autonomous Sanctions Regulations 2011 and various instruments made under those regulations) provides the power for the government to impose broad sanctions to facilitate the conduct of Australia's external affairs (the autonomous sanctions regime). The Charter of the United Nations (Sanctions—Democratic People's Republic of Korea) Amendment (2017 Measures No. 1) Regulations 2017 [F2017L00878] is made under the *Charter of the United Nations Act 1945.* This Act (in conjunction with various instruments made under that Act)[1] gives the Australian government the power to apply sanctions to give effect to decisions of the United Nations Security Council by Australia (the UN Charter sanctions regime).[2]

1.112 An initial human rights analysis of various instruments made under both sanctions regimes is contained in the *Sixth report of 2013* and *Tenth report of 2013*.[3] A further detailed analysis of various instruments made under both sanctions regimes is contained in the *Twenty-eighth report of the 44th Parliament* and *Thirty-third report of the 44th Parliament.*[4] This analysis stated that, as the instruments under consideration expanded or applied the operation of the sanctions regime by designating or declaring that a person is subject to the sanctions regime, or by amending the regime itself, it was necessary to assess the human rights compatibility of the autonomous sanctions regime and aspects of the UN Charter sanctions regime as a whole when considering instruments which expand the operation of the sanctions regime. A further response was therefore sought from the minister, which was considered in the committee's *Report 9 of 2016*.[5] The committee concluded its

1 See in particular the Charter of the United Nations (Dealing with Assets) Regulations 2008 [F2014C00689].

2 Note, together the autonomous sanctions regime and the UN Charter sanctions regime are referred to as the 'sanctions regimes'.

3 See Parliamentary Joint Committee on Human Rights, *Sixth report of 2013* (15 May 2013) 135-137; and *Tenth report of 2013* (26 June 2013) 13-19 and 20-22.

4 See Parliamentary Joint Committee on Human Rights, *Twenty-eighth report of the 44th Parliament* (17 September 2015) 15-38; and *Thirty-third report of the 44th Parliament* (2 February 2016) 17-25.

5 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 41-55.

examination of various instruments and made a number of recommendations to ensure the compatibility of the sanctions regimes with human rights.[6]

## 'Freezing' of designated person's assets and prohibition on travel

1.113 The Autonomous Sanctions Amendment (Democratic People's Republic of Korea) Regulations 2017 [F2017L00880] amends the Autonomous Sanctions Regulations 2011 to expand the grounds upon which the Minister for Foreign Affairs can designate persons or entities for targeted financial sanctions and travel bans in respect of the Democratic People's Republic of Korea (DPRK). The expanded grounds are that the person or entity is:

- associated, or has been associated, with the DPRK's weapons of mass-destruction program or missiles program; or
- assisting, or has assisted, in the violation, or evasion, by the DPRK of certain United Nations Security Council Resolutions that relate to the DPRK.

1.114 The Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 [F2017L00637] and Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment List 2017 [F2017L00675] designate persons and entities for the purposes of the Autonomous Sanctions Regulations 2011 on the basis that the minister is satisfied that a person or entity is:

- associated with the DPRK's weapons of mass-destruction program or missiles program; or
- responsible for, or complicit in, the threat to the sovereignty and territorial integrity of Ukraine.

The designation has the effect that this person or entity is subject to financial sanctions, and cannot travel to, enter, or remain in Australia[7] (or their designation or declaration is continued).[8] In addition, the Charter of the United Nations (Sanctions—Democratic People's Republic of Korea) Amendment (2017 Measures No. 1) Regulations 2017 [F2017L00878] gives effect to certain United Nations

6 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 41-55 at 53.

7 Section 6(1) of the Autonomous Sanctions Regulations 2011 provides that for the purposes of paragraph 10(1)(a) of the *Autonomous Sanctions Act 2011*, which empowers the minister to make regulations for the purpose of imposing sanctions, the minister may, by legislative instrument: (a) designate a person or entity mentioned in an item of the table as a designated person or entity for the country mentioned in the item; (b) declare a person mentioned in an item of the table for the purpose of preventing the person from travelling to, entering or remaining in Australia.

8 See Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment List 2017 [F2017L00675].

Security Council Resolutions imposing further sanctions on the DPRK, including the prohibition of certain imports, procurement, and scientific and technical cooperation involving persons or groups officially sponsored by or representing the DPRK.[9] This instrument expands the definition of 'designated person' (that is, a person who is designated as subject to the UN Charter sanctions regime) in section 4 of the Charter of the United Nations (Sanctions — Democratic People's Republic of Korea) Regulations 2008 to include persons or entities to whom the measures mentioned in paragraph 8(d) of UN Security Council Resolution 1718 apply under a decision of the United Nations Security Council or the Committee.[10]

***Compatibility of the measure with multiple human rights***

1.115 As set out in the committee's previous consideration of the sanctions regimes, the measures in these instruments engage and limit multiple human rights. The statements of compatibility for these instruments do not identify the relevant human rights engaged or provide any analysis in relation to the issues identified in the committee's previous reports.

1.116 The committee has previously recognised that applying pressure to regimes and individuals with a view to ending the repression of human rights internationally is a legitimate objective that may support limitations on human rights. However, in relation to the decision to designate or declare a person under the sanctions regimes, the committee's *Report 9 of 2016* set out in detail how each of the identified safeguards in the sanctions regimes are insufficient, and why the sanctions regimes are thereby not proportionate limitations on human rights.[11]

1.117 The committee therefore made a number of recommendations to the minister in respect of the sanctions regimes.[12]

## Committee comment

**1.118 The committee refers to its previous consideration of the sanctions regimes, and in particular, the recommendations made by the committee in its *Report 9 of 2016.***

9 See item 55 of the Charter of the United Nations (Sanctions—Democratic People's Republic of Korea) Amendment (2017 Measures No. 1) Regulations 2017 [F2017L00878].

10 This definition previously included only persons or entities that: (a) the Minister has designated under regulation 4A; or (b) the Committee established by paragraph 12 of UN Security Council Resolution 1718 or the UN Security Council designates for paragraph 8(d) of Resolution 1718.

11 See Parliamentary Joint Committee on Human Rights, *Twenty-eighth report of the 44th Parliament* (17 September 2015) 15-38.

12 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 53.

# Criminal Code Amendment (Control Orders—Legal Representation for Young People) Regulations 2017 [F2017L00843]

| | |
|---|---|
| **Purpose** | Provides for process for legal representation for young people in respect of control orders |
| **Portfolio** | Attorney-General |
| **Authorising legislation** | *Criminal Code Act 1995* |
| **Last day to disallow** | 15 sitting days after tabling (tabled in the House of Representatives and the Senate 8 August 2017) |
| **Rights** | Multiple (see **Appendix 2**) |
| **Status** | Advice only |

## Background

1.119 The committee previously considered amendments to the control orders regime which allowed for control orders to be imposed on children aged 14 or 15 years of age under Division 104 of the *Criminal Code Act 1995* (Criminal Code) in *Report 7 of 2016*.[1]

1.120 The committee has also previously considered the control orders regime as more broadly part of its consideration of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014;[2] and the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014.[3]

## Young person's right to legal representation in control order proceedings

1.121 Section 104.28(4) of the Criminal Code requires an issuing court to appoint a lawyer for a young person aged 14 to 17 years in relation to control order proceedings, where the young person does not have legal representation, except in limited circumstances.

1.122 The Criminal Code Amendment (Control Orders—Legal Representation for Young People) Regulations 2017 [F2017L00843] (the regulations) operationalises this provision by providing that the court may request the legal aid commission to

1 See, Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 64.

2 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 3.

3 See Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament* (25 November 2014) 7.

arrange representation and the Australian Federal Police are to inform relevant persons.[4]

***Compatibility of the measure with the right of the child to be heard***

1.123 As previously noted by the committee, providing for a child to have access to legal representation is compatible with the right to a child to be heard in judicial and administrative proceedings. Accordingly, the operationalisation of this measure through the regulations is also compatible with this right. However, notwithstanding this safeguard, concerns remain more generally as to the human rights compatibility of applying the control orders regime to children. These are set out in full in the committee's *Report 7 of 2016.*[5]

## Committee comment

**1.124 The committee draws the human rights implications of the regulations to the attention of parliament.**

4 See, sections 3A-3C.

5 See, Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 70-73.

# Bills not raising human rights concerns

1.125 Of the bills introduced into the Parliament between 4 and 7 September, the following did not raise human rights concerns (this may be because the bill does not engage or promotes human rights, and/or permissibly limits human rights):

- Aged Care Amendment (Ratio of Skilled Staff to Care Recipients) Bill 2017;
- A New Tax System (Goods and Services Tax) Amendment (Make Electricity GST Free) Bill 2017;
- ASIC Supervisory Cost Recovery Levy Amendment Bill 2017;
- Australian Grape and Wine Authority Amendment (Wine Australia) Bill 2017;
- Customs Amendment (Singapore-Australia Free Trade Agreement Amendment Implementation) Bill 2017;
- First Home Super Saver Tax Bill 2017;
- High Speed Rail Planning Authority Bill 2017;
- Regional Forest Agreements Legislation (Repeal) Bill 2017;
- Renewable Energy (Electricity) Amendment (Continuing the Energy Transition) Bill 2017;
- Telecommunications Amendment (Guaranteeing Mobile Phone Service in Bushfire Zones) Bill 2017; and
- Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 1) Bill 2017.